

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 7TH DECEMBER 2006 / 16TH AGRAHAYANA 1928

OP.No. 10180 of 2003(J)

PETITIONER:

LAKSHMANA, IPS (RETD.),
S/O. LATE KANHAN IGP KERALA POLICE (RETD.)
AGED 67 YEARS, RESIDING AT DEVI, SOORYA 171,
EDAKULAM, PEROORKADA POST,
THIRUVANANTHAPURAM-695 005.

BY ADV. SMT.SANGEETHA LAKSHMANA

RESPONDENTS:

1. CENTRAL BUREAU OF INVESTIGATION,
REPRESENTED BY ITS DIRECTOR, NEW DELHI.
2. CENTRAL BUREAU OF INVESTIGATION,
SIC II, SIU V, NEW DELHI, REPRESENTED BY ITS
INSPECTOR.
3. STATE OF KERALA, REPRESENTED BY THE
CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM.
4. UNION OF INDIA, REPRESENTED BY ITS
SECRETARY, MINISTRY OF HOME AFFAIRS,
NEW DELHI.

BY ADV. SRI.P.S.SREEDHARAN PILLAI, SCGSC
SRI.S.SREEKUMAR, SC FOR CBI
PUBLIC PROSECUTOR SRI. GIKKU JACOB.
SRI JOHN VARGHESE, ASSISTANT SG

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD
ON 07/12/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER ON C.M.P.NO.17580/03 IN OP NO.10180/03:

DISMISSED

7/12/2006

SD/- R. BASANT, JUDGE.

//TRUE COPY//

R. BASANT, J.

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Dated this the 7th day of December, 2006

JUDGMENT

When violent naxalite activity was at its peak in Kerala, the death of a naxalite leader one Varghese took place on 18/2/1970. He was allegedly wanted in some crimes. It was reported that his death occurred in an encounter with the police. Crime No.28/70 of the Mananthavady Police Station was registered under the caption “unnatural death” and it was promptly closed after enquiry. After about three decades, consequent to the alleged disclosures made by a Police Constable who was allegedly involved in such an alleged encounter, public interest litigations were filed before this Court and by Ext.P2 order dated 27/1/1999 this Court directed the C.B.I. to register a crime and investigate. Thus, the F.I.R. was registered on 3/3/99. Investigation was conducted, completed and final report was filed on 11/12/2002. Cognizance was taken. At that stage, the 2nd accused who was charged sheeted came to this Court with this petition under

Art.226 of the Constitution praying that the final report and all further proceedings may be quashed. It is, thus, that the matter is before this Court now.

2. The 1st accused is the Constable who allegedly made the confession and who allegedly shot the deceased at the instructions of accused 2 and 3. The 2nd accused was a young Deputy Superintendent of Police at the relevant point of time and the 3rd accused was the Superintendent of Police at the time in the District.

3. Various contentions have been raised in this writ petition to support the prayer for quashing of the proceedings. But after discussions at the Bar, the learned counsel for the petitioner submits that all other contentions raised shall, if necessary, be raised before the Sessions Court (Special Court, C.B.I.) to which the case has already been committed and this Court now need to consider only the contention that the petitioner cannot aspire to get fair trial if the trial were to be held at this belated hour. That is the only contention which has been raised.

4. The learned counsel for the petitioner wants me to and I must scrupulously avoid the temptation to advert to the facts in detail and make any observations which may prejudice the interests of the parties in the trial which will have to be undertaken if proceedings are not quashed. I shall advert to the minimal required facts only. My attention has been drawn to the decisions which have dealt with the impact of the delay in investigation/trial in respect of a criminal offence. It is trite that there may be instances where the delay virtually renders fair trial impossible. The learned counsel for the petitioner contends that this is such a case where on account of the lapse of a period exceeding 3 ½ decades by now the accused is disabled and it is not possible for him to set up an effective defence on account of the lapse of time. The learned counsel for the petitioner carefully points out that it is not the number of days, months and years that have gone by that disables the petitioner. The inevitable absence/lack of necessary documents does also result in denial of fair trial and justice to the petitioner, it is contended.

5. My attention has been drawn to the relevant precedents

on the subject. In particular, I have been taken through the decisions in **Abdul Rehman Antulay v. R.S. Nayak** ((1992) 1 SCC 225); **Common Cause, a Registered Society v. Union of India** (1996) 4 SCC 33); **Common Cause, a Registered Society ((1996) 6 SCC 775)**; **Raj Deo Sharma v. State of Bihar** (AIR 1998 SC 3281); **Raj Deo Sharma v. State of Bihar** (AIR 1999 SC 3524) and **P. Ramachandra Rao v. State of Karnataka** ((2002) 4 SCC 578).

6. No inflexible standard or rigid yardstick can be employed by a court while deciding whether the delay entail denial of the right to fair trial and deprives the indictee of a reasonable opportunity to defend himself. Any refined system of law will certainly have to accept and recognise the right for fair trial and the right to fair trial certainly includes the availability of a reasonable opportunity to defend himself in the trial. Various circumstances may intervene which would threaten this right to fair trial of the accused. The right of the individual facing trial on the one side and the societal interests for justice on the other will have to be balanced and harmonised to decide

whether it would be just, proper and fair to compel the accused to go for trial belatedly in a case like the instant one.

7. Truth does or at least must ultimately triumph. There can be no dispute that the circumstances under which the delay occurred have got to be considered very cautiously. Even assuming that the case may ultimately end for want of cogent and acceptable evidence, I am certainly of opinion that the inherent jurisdiction under Sec.482 of the Cr.P.C. or the constitutional jurisdiction under Art.226 cannot be lightly invoked to thwart a trial. At times there is justice in the trial itself. Sending round the message that the guilty will not be spared wherever the lapse of time is certainly important in a society where the rule of law prevails. I shall scrupulously be circumspect but I do take note that the offence is allegedly committed under sheer arrogance of power in the hope or the assumption that the crime shall not be brought to light. There is also an assumption that the polity, worried about the menace, will also appreciate a little highhandedness on the part of law enforcers. It will certainly be a good message that whether the

lapse of time and however mighty they be, the offenders will be brought to book ultimately and they will have to face trial. The mere fact that those responsible for the alleged crime were successful in keeping the offence under cover and secrecy for a long period of time cannot certainly help them to successfully claim immunity from prosecution on the basis of the delay for which they were themselves responsible.

8. Will justice be denied because of the lapse of time and the inability of the accused to get at all necessary documents? This is the question to be considered. Even the prosecution is not able to lay their hands on many documents which could have been ordinarily reckoned as important. But, in the facts and circumstances of this case (and in fact, I have been taken through the entire gamut of materials that are available) I am unable to agree that the mere lapse of time and the consequent inevitable non-availability of some of the documents which may have been useful for the prosecution or the accused is sufficient in itself in a case like the instant one to save the accused of even the trauma of a criminal trial. Of course, the learned counsel for

the petitioner prays that it will be open to the petitioner to claim discharge. I shall therefore, as requested by the learned counsel for the petitioner also, not advert to the materials which allegedly justify the charge now raised. Suffice it to say that I have been taken through the final report submitted by the C.B.I. in which there is a detailed narration of the facts and evidence which the C.B.I. would like to introduce in the trial. The C.B.I. particularly relies on the admitted fact of death by fire arm injury of the deceased. The C.B.I. relies on the fact that it is the petitioner who has recorded the information reckoned as the F.I.R. in Crime No.28/70. The C.B.I. relies on the fact that the contents of the First Information Statement recorded by the petitioner is allegedly false. The C.B.I. relies on the fact that Varghese was apprehended much earlier and it was not a case of any encounter at all. Though a confession of the co-accused is relied on, consequent to the death of the accused who allegedly made the confession, the same may not be available now for trial. Be that as it may, even without that I am certainly of opinion that to meet the allegations which the C.B.I. wants to

raise as revealed in the final report the lapse of time and the inevitable non-availability of documents cannot be held to be sufficient to justify a contention of denial of right of a fair trial. This certainly is an eminently fit case where the accused must be directed to face a trial commencing from framing of charge. Of course, the question whether the charges have to be framed or not and the materials justify discharge under Sec.227 or framing charge under Sec.228 of the Cr.P.C. will be decided by the Special Judge at the stage of Sec.227/228 of the Cr.P.C.

9. The learned counsel for the petitioner submits that the petitioner is ill and will not be able to physically appear before the learned Special Judge for a further period of three months. I do not want to express any opinion. The petitioner has admittedly appeared before the committal court already. To decide on the question of framing of charge/discharge, it may not be necessary for the court to insist on the personal appearance of the petitioner. Hence I make no further directions on that aspect.

10. In the result, this Original Petition is dismissed. In the

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facts and circumstances of this case, the learned Special Judge must certainly endeavour an expeditious disposal of the case. I need only direct the learned Special Judge to finally dispose of the case as expeditiously as possible – at any rate, within a period of six months from this day.

11. Communicate a copy of this judgment to the learned Special Judge forthwith.

(R. BASANT, JUDGE)

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